

Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL HIGHT and MICHAEL
AUGUSTINE, on behalf of themselves and
all others similarly situated,

Plaintiffs,

vs.

IKO MANUFACTURING, INC., a Delaware
Corporation, IKO INDUSTRIES, LTD., a
Canadian Corporation, IKO SALES, LTD., a
Canadian Corporation, IKO PACIFIC, INC.,
a Washington Corporation, IKO CHICAGO,
INC., an Illinois Corporation,

Defendants.

Case No. 2:09-cv-00887-RSM

**JOINT MOTION TO STAY
PROCEEDINGS PENDING DECISION
BY THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION**

**NOTE FOR HEARING: September 22,
2009**

RELIEF REQUESTED

This Court has entered an order staying the time for IKO Manufacturing Inc., IKO Pacific, Inc. and IKO Chicago, Inc. to answer or otherwise plead until the Judicial Panel on Multidistrict Litigation ("JPML") rules on a pending motion to transfer this case to the JPML. [Dkt. # 12]. By this motion, Plaintiffs Michael Hight and Michael Augustine (collectively, "Plaintiffs") and Defendants IKO Manufacturing, Inc., IKO Pacific, Inc. and IKO Chicago, Inc.

(collectively, the “Moving Defendants,” and together with Plaintiffs, the “Moving Parties”), jointly move this Court to stay *all* proceedings in this action pending a decision by the JPML on the Moving Defendants’ pending motion to transfer this and three other putative class actions for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407 (“MDL Motion”).

FACTS

1. This case is one of four putative class actions currently pending in four federal district courts in New York, Illinois, New Jersey, and Washington:

- A. *Czuba v. IKO Manufacturing, Inc.*, Case No. 1:09-cv-00409-WMS (Western District of New York)
- B. *McNeil v. IKO Manufacturing, Inc.*, Case No. 1:09-cv-04443 (Northern District of Illinois)
- C. *Zanetti v. IKO Manufacturing, Inc.*, Case No. 2:09-cv-02017-DRD-MAS (District of New Jersey)
- D. *Hight v. IKO Manufacturing, Inc.*, Case No. 2:09-cv-00887-RSM (Western District of Washington)

2. The plaintiffs in these actions allege that roofing shingles manufactured by the Moving Defendants and installed on homes purchased by the plaintiffs failed prematurely. Collectively, these four actions are referred to as the “IKO Roofing Shingle Actions.”

3. On August 6, 2009, the Moving Defendants submitted for filing with the JPML their MDL Motion seeking to transfer the IKO Roofing Shingle Actions for coordinated or consolidated pretrial proceedings. On August 27, 2009, Plaintiffs responded to the MDL Motion, and joined in the request for transfer of the IKO Roofing Shingle Actions. The Moving Parties therefore agree that the IKO Roofing Shingle Actions should be transferred.

1 4. The parties agree that this Court should temporarily stay proceedings pending a
2 decision on the motion to transfer (“MDL Motion”) of Defendants IKO Manufacturing Inc.,
3 IKO Pacific Inc., and IKO Chicago Inc. (collectively, the “Moving Defendants”) because a stay
4 will conserve judicial resources and eliminate the risk of inconsistent pretrial rulings. Similar
5 actions are pending in other federal district courts that may be transferred with this action before
6 one federal judge.

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8 5. Plaintiffs and the Moving Defendants (collectively referred to as the “Moving
9 Parties”) are jointly seeking a stay of all of the IKO Roofing Shingle Actions pending the
10 JPML’s ruling to help ensure that cases proceed at the same pace to avoid waste, duplication of
11 efforts and conflicting pretrial rulings. The plaintiffs and the Moving Defendants are
12 contemporaneously filing similar motions for a stay in the other three IKO Roofing Shingle
13 Actions.

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15 6. The Moving Parties agree that staying this proceeding for a short amount of time
16 will not unfairly prejudice any of the parties to this litigation because it is still in the early
17 stages. A complaint has been filed, but no responsive pleading has been filed and no discovery
18 has been taken. Indeed, this Court has already entered an order staying the time for IKO
19 Manufacturing Inc., IKO Pacific, Inc. and IKO Chicago, Inc. to answer or otherwise plead until
20 the JPML rules on the MDL Motion. [Dkt. # 12].¹

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22 7. Staying these proceedings will, among other things, excuse the parties from
23 engaging in preliminary discovery conferences which could prove futile if the case is transferred
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27 ¹ The courts in *McNeil* (N.D. Ill.) and *Zanetti* (D.N.J.) have likewise entered orders staying the time for Moving Defendants to answer or otherwise plead until the JPML rules on the MDL Motion.

1 to the MDL Panel. A stay will also serve as a courtesy to the judges on the JPML because it
 2 will allow them a reasonable amount of time to rule on the MDL Motion.

3 8. The plaintiffs and the Moving Defendants are contemporaneously filing similar
 4 motions for a stay in the other three IKO Roofing Shingle Actions.

5 **ISSUE PRESENTED**

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 7 This Court has entered an order staying the time for IKO Manufacturing Inc., IKO
 8 Pacific, Inc. and IKO Chicago, Inc. to answer or otherwise plead in this lawsuit until the JPML
 9 rules on the MDL Motion. Should this Court likewise stay all other proceedings until after the
 10 JPML enters its ruling?

11 **ARGUMENT AND AUTHORITIES**

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 13 This Court possesses an inherent power to stay proceedings before it. *Landis v. North*
 14 *Am. Co.*, 299 U.S. 248, 254-55 (1936) (“the power to stay proceedings is incidental to the power
 15 inherent in every court to control the disposition of the causes on its docket with economy of
 16 time and effort for itself, for counsel and for litigants”). Courts routinely exercise this inherent
 17 authority to stay pretrial proceedings during the pendency of a motion to transfer pretrial
 18 proceedings pursuant to 28 U.S.C. § 1407. Indeed, “a stay ensures that there is consistent
 19 treatment of numerous lawsuits and that judicial resources are not wasted.” *Eggart v. A.L.S.*
 20 *Enters., Inc.*, No. CV-09-0107, 2009 U.S. Dist. LEXIS 51886, at *3 (E.D. Wash. Jun. 2, 2009)
 21 (granting a stay pending the JPML’s decision to transfer); *see also Gonzalez v. Merck & Co.,*
 22 *Inc.*, No. CV-07-3034, 2007 U.S. Dist. LEXIS 56326, at *6 (W.D. Wash. Aug. 2, 2007) (finding
 23 a stay pending transfer to a MDL will promote judicial economy); David F. Herr, “Multidistrict
 24 Litigation Manual: Practicing Before the Judicial Panel on Multidistrict Litigation,” § 3:15 at 32
 25 (noting that “[d]istrict courts. . . readily stay[] proceedings pending a Panel decision.”). That is
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1 because interim stays: (1) promote judicial economy; and (2) avoid inconsistent results among
 2 district judges in different district courts. *Eggart*, 2009 U.S. Dist. LEXIS 51886, at *3

3 An interim stay in this case, put into place while the JPML decides the MDL Motion,
 4 will serve both goals while allowing the JPML a reasonable opportunity to rule on the MDL
 5 Motion. *Id.* (staying the suit pending a decision from the JPML for the sake of consistency and
 6 judicial economy); *see also Tench v. Jackson Nat'l Life Ins. Co.*, No. 99 C 5182, 1999 U.S.
 7 Dist. LEXIS 18023, at *3-5 (N.D. Ill. Nov. 12, 1999) (staying all pretrial proceedings pending
 8 the JPML's transfer decision and noting that such stays are frequently granted to "avoid
 9 duplicative efforts and preserve judicial resources"); *Johnson v. AMR Corp.*, No. 95 C 7659,
 10 1996 U.S. Dist. LEXIS 4172, at * 11 (N.D. Ill. Apr. 3, 1996) (concluding that "the best course is
 11 to postpone ruling on the present motions. . . and allow the MDL panel to determine whether to
 12 make its conditional order final.").²

13 **First**, staying proceedings in this action will avoid forcing the parties to engage in
 14 duplicative pretrial practice. If numerous courts, including this Court, proceed with pretrial
 15 matters in advance of any decision by the JPML, then the efforts of this Court and the other
 16 courts (and the litigants in the actions over which the courts preside) might needlessly be
 17 repeated, perhaps many times over. Even worse, the efforts of these courts might be negated by
 18 any inconsistent decisions of any transferee court.

19 On the other hand, if this Court stays these proceedings and the JPML grants the MDL
 20 Motion and transfers all of the IKO Roofing Shingle Actions before a single judge in a single
 21 district court, the transferee court will be able to develop a common sense pretrial program that
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 27 ² Copies of the unpublished decisions are attached as Exhibit A.

1 will ensure that the parties do not engage in duplicative work and will “conserve the resources
 2 of the parties, their counsel and the judiciary.” *In re Musha Cay Litig.*, 330 F. Supp. 2d 1364,
 3 1365 (J.P.M.L. 2004); *see also In re FedEx Ground Package Sys., Inc., Employment Practices*
 4 *Litig. (No. II)*, 381 F. Supp. 2d 1380, 1381-82 (J.P.M.L. 2005) (noting that the transferee court
 5 has the ability to “structure pretrial proceedings to consider all parties’ legitimate discovery
 6 needs while ensuring that common parties and witnesses are not subjected to discovery demands
 7 that duplicate activity that will occur or has already occurred in other actions.”); *In re M3Power*
 9 *Razor Sys. Mktg. & Sales Practices Litig.*, 398 F. Supp. 2d 1363, 1364-65 (J.P.M.L. 2005)
 10 (same); *In re IDT Corp. Calling Card Terms Litig.*, 278 F. Supp. 2d 1381, 1381-82 (J.P.M.L.
 11 2003) (same).

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 13 Indeed, upon transfer, the plaintiffs in all of the actions will likely file a single
 14 consolidated complaint. *See* 8 Moore’s Federal Practice, § 42.13[5][a] at 42-30.1 (noting
 15 advantages of consolidated complaints as a management tool for complex litigation). Such a
 16 consolidated complaint could allow the Moving Defendants and any other defendant to answer
 17 or move for dismissal, once rather than four times (or more).

18 ***Second***, staying the proceedings in this action and ultimately coordinating this action
 19 with the other IKO Roofing Shingle Actions before a single federal judge will allow the judge to
 20 consider any common legal and factual pretrial issues together. *See WorldCom*, 244 F. Supp. 2d
 21 at 905-06. This approach would eliminate the risk that inconsistent decisions would be reached
 22 simultaneously by different federal district judges deciding common issues involving the same
 23 parties and the same putative classes. *See* 28 U.S.C. § 1407(a); *In re Air Crash Near Kirksville,*
 25 *Mo.*, 383 F. Supp. 2d 1382, 1383 (J.P.M.L. 2005) (noting that consolidation will “prevent
 26 inconsistent pretrial rulings”).
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Third, the entry of an interim stay will serve as a courtesy to the members of the JPML, who in addition to serving on the JPML are members of the federal circuit and district court benches. 28 U.S.C. § 1407(d). These judges presumably have dozens of cases under their regular docket over which they preside that also require their attention. Staying this proceeding for a short of amount of time will allow the JPML judges a reasonable amount of time to rule on the MDL Motion.

Finally, the parties agree that an interim stay will not unfairly prejudice any of them. The litigation is still in the early stages as only a complaint has been filed. No responsive pleading has been filed and no discovery has been taken. If the MDL Motion is granted, and this case is transferred with the other actions, then the parties will have an opportunity to raise pretrial matters with the transferee court at the appropriate time. *See, e.g., Eggart*, 2009 U.S. Dist. LEXIS 51886, at *2. Under these circumstances, no party to this litigation faces unfair prejudice from the requested stay.

CONCLUSION

A temporary stay of these proceedings while the JPML decides the Moving Defendants' MDL Motion is appropriate. It will help avoid duplicative pretrial motion practice and discovery, and will minimize the risk of there being inconsistent decisions in the multiple IKO Roofing Shingle Actions. In addition, none of the parties will be prejudiced by a temporary stay. Accordingly, the Court should stay all pretrial proceedings in this case pending the JPML's decision on the MDL Motion.

1 Dated: September 22, 2009

Jointly and respectfully submitted,

2 **MICHAEL HIGHT and**
3 **MICHAEL AUGUSTINE,**

IKO MANUFACTURING INC.,
IKO PACIFIC INC., and
IKO CHICAGO INC.,

4 /s/ Kim D. Stephens

/s/ Jack M. Lovejoy

5 Kim D. Stephens, WSBA No. 11984
6 TOUSLEY BRAIN STEPHENS PLLC
7 1700 Seventh Avenue, Suite 2200
8 Seattle, Washington 98101
9 Tel: 206-682-5600
10 Fax: 206-682-2992
11 kstephens@tousley.com

Jack M. Lovejoy, WSBA No. 36962
CABLE LANGENBACH KINERK &
BAUER LLP
Suite 3500, 1000 Second Avenue Building
Seattle, Washington 98104-1048
(206) 292-8800 phone
(206) 292-0494 facsimile
jlovejoy@cablelang.com

12 Charles J. LaDuca
13 Brendan S. Thompson
14 CUNEO GILBERT & LADUCA, LLP
15 507 C. Street NE
16 Washington, DC 20002
17 Tel: 202-789-3960
18 Fax: 202-789-1813

19 Clayton D. Halunen
20 Shawn J. Wanta
21 HALUNEN & ASSOCIATES
22 1650 IDS Center
23 80 South Eighth Street
24 Minneapolis, Minnesota 55402
25 Tel: 612-605-4098
26 Fax: 612-605-4099

27 Robert J. Shelquist
LOCKRIDGE, GRINDAL & NAUEN, P.L.L.P.
100 Washington Avenue South, Suite 2200
Minneapolis, Minnesota 55401
Tel: 612-339-6900
Fax: 612-339-0981

1 Charles Schaffer
2 Arnold Levin
3 LEVIN, FISHBEIN & BERMAN
4 510 Walnut Street – Suite 500
5 Philadelphia, Pennsylvania 19106
6 Tel: 215-592-1500
7 Fax: 215-592-4663

8 Michael A. McShane
9 AUDET & PARTNERS, LLP
10 221 Main Street, Suite 1460
11 San Francisco, California 94105
12 Tel: 415-568-2555
13 Fax: 415-576-1776
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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2009, I served a copy of the foregoing document to all counsel of record via the ECF/CM document filing system.

/s/ Jack M. Lovejoy

Jack M. Lovejoy, WSBA No. 36962

Attorney for Defendants IKO MANUFACTURING INC.,

IKO PACIFIC INC., IKO CHICAGO INC.

CABLE, LANGENBACH, KINERK & BAUER, LLP

Suite 3500, 1000 Second Avenue Building

Seattle, Washington 98104-1048

(206) 292-8800 phone

(206) 292-0494 facsimile

jlovejoy@cablelang.com